CHEAH THEAM SWEE & ANOR.

v.

OVERSEAS UNION BANK LTD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[CIVIL SUIT NO. C6837 OF 1985]
8 JULY 1987

CIVIL PROCEDURE: *Injunction - Principles on which interlocutory injunctions granted - Non-disclosure of material facts and misrepresentation of facts whether fatal to the grant of an interlocutory injunction - Whether plaintiffs came with clean hands - Whether injunction could be maintained if whole transaction was illegal - Section 50(1) Specific Relief Act 1950 - Whether undertaking as to damages a barren act - Absence of affidavit of means.*

COMPANY LAW: *Whether s. 147 Companies Act complied with in the appointment of the 10th defendant as representative - Whether removal of directors appointed by the Bank in exercise of the power of attorney granted valid in absence of special notice - Sections 147, 182, 153 Companies Act - Whether loan transaction amounted to contravention of s.67 Companies Act - FIC guidelines - Whether contravened.*

CIVIL PROCEDURE: *Opinion by solicitors given on a without prejudice basis - Whether could be admitted in evidence - Section 23 Evidence Ordinance - Application by motion for ex parte injunction to be discharged - Whether further affidavit could be filed after - Applicant's submission completed - Discretion of the Court.*

The plaintiffs were minority shareholders in United Securities Sdn. Bhd., the 11th defendant, which borrowed RM43,850,000 (the said loan) from the first defendant. The 11th defendant executed a loan agreement and debenture, as security. The plaintiffs as directors and the 10th defendant as chairman of the 11th defendant defaulted in their payments and the 1st defendant sought to recover the said loan. The plaintiffs filed a suit and obtained an *ex parte* interlocutory injunction upon the ground that the entire loan transaction was illegal as being in contravention of s. 67 Companies Act 1965 and the guidelines of the Foreign Investment Committee. The 1st defendant applied by motion to set aside the injunction. The issue was whether the injunction should be set aside.

Held:

[1] On the facts of the case there was non disclosure of material facts and misrepresentation which were deliberate or reckless and as such would disentitle the plaintiffs to equitable relief.

[2] That whether or not this loan transaction was illegal and/or in contravention of s. 67, Companies Act was at best a serious question to be argued at trial.

[3] That the opinion of the solicitors could be admitted in evidence as s. 23 of the Evidence Ordinance was meant to cover only genuine overtures for the settlement of an existing dispute.

[4] That the plaintiffs could not file a further affidavit after the applicant had completed their submission, as to do so would have been to permit an abuse of process and that in the interest of the effective administration of justice the rules as to the filing and service of pleadings should apply *mutatis mutandis* to affidavits.

[5] That on the facts of the case there was no contravention of the guidelines of the Foreign Investment Committee as the Foreign Investment Committee and Bank Negara's approval had been obtained in respect of the loan transaction and that they had been fully cognisant of the relevant facts.

[6] That accordingly the *ex parte* injunction be dissolved and that there be an enquiry as to damages which is to be assessed without waiting for trial.

Cases referred to:

Seeni Chettiar v. Santhanathan Chettiar [1896] (2) ILR. (Madras) 58
Lakshminarasimhiah v. Yalakki Gowdiah [1965] AIR Mysore 310
Lodge v. National Union Investment Company Ltd. [1907] 1 Ch D 300
Sayers v. Collyer [1884] 28 Ch D 103
Dhannu Lal v. Bansidhar Marwari [1929] AIR Patna 349
Boyce v. Gill [1891] 64 LT 824
M.R.K. Nayar v. Ponnusamy [1981] CLJ (Rep) 218
Ho Kok Cheong Sdn. Bhd. v. Lim Kay Tiong [1979] 1 MLJ 224
MAA Holdings Sdn. Bhd. v. Ng Siew Wah [1986] 1 MLJ 170
American Cynamid v. Ethicon Ltd. [1975] AC 396
Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd. [1979] 1 MLJ 150
Lian Keow Sdn Bhd v. Overseas Credit Finance [1982] CLJ (Rep) 182
In re Homer District Consolidated Gold Mines [1888] 39 Ch D 546
In re Portuguese Consolidated Copper Mines Ltd. [1889] 52 Ch D 160
Young v. Ladies' Imperial Club, Ltd. [1920] 2 KB 523
Pender v. Lushington [1887] 6 Ch D 70
Musselwhite & Anor. v. C.H. Musselwhite [1962] 1 Ch 964
Armour Hick Northern & Ors. v. Whitehouse & Ors. [1980] 1 WLR 1520
Juniper Pty. Ltd. v. Grausom [1983] 8 ACLR 212
Wallersteiner & Ors. v. Moir [1974] 1 WLR 991
Kok Hoong v. Leong Cheong Kweng Mines Ltd. [1964] 30 MLJ 49
Rasiah Munusamy v. Lim Tan & Sons Sdn. Bhd. [1982] CLJ (Rep) 266
La Banque Jacques-Carties v. La Banque D'Epargene De La Cite Et Du District De Montreal [1887] 13 AC111
Dottie Karan & Ors. v. Lachmi Prasad Sinha [1930] 58 IA 58
Patience Kasumu & Ors. v. Gbadamosi Baba-Edbe [1956] AC 539
David Hey v. New Kok Ann Realty Sdn. Bhd. [1985] 1 MLJ 167
Wilkinson v. Osborne & Another [1915] 21 CLR 89
Egerton v. Earl Brownlow & Ors. [1843-60] All ER Rep 970
Ng Siew Wah & Ors. v. MAA Holdings Sdn. Bhd. & Anor. [1985] 2 MLJ 332
Belmont Finance Corporation Ltd. v. Williams Furniture Ltd. & Ors. [1979] Ch 250
Lonrho Ltd. & Anor. v. Shell Petroleum Co. Ltd. & Anor. [1982] AC 173
Skelton v. South Auckland Blue Metals Limited (In Liquidation) [1969] NZLR 955
Merchant Credit Pte. Ltd. v. Industrial & Commercial Reality Co. Ltd. [1983] 1 MLJ 124
Re Wellington Publishing Company Limited [1973] 1 NZLR 133
Snell v. United Finance Co. Ltd. [1964] 2 QB 203
Merchantile Credit Co. Ltd. v. Hamblin [1964] 1 WLR 423
Esa bin Sayon v. Woon Kim Poh & Anor. [1985] CLJ (Rep) 463
Thanet District Council v. Ninedrive Ltd. & Ors. [1978] 1 All ER 703
Vam Ltd v. McDonald Industires Ltd. [1971] ACLC 27
Theresa Chong v. Kin Khoon & Co. [1976] 2 MLJ 253
Printing and Numerical Registering Company v. Sampson [1875] 19 Eq Cas 462
Dalglish v. Jarvie [1851] 20 LJ Ch 475
Baxter v. Claydon [1952] WN 376
Mohamed Zainuddin bin Puteh v. Yap Chee Seng [1978] 1 MLJ 40
Belmont Finance Corporation v. Williams Furniture Ltd & Ors. (No.2) [1980] 1 All ER 393

Ross v. Buxton [1888] WN 55
Marc Rich & Co. Pte Ltd. v. Oroleum International Ltd. [1987] - 1 MLJ clxxviii
Newby v. Harison [1861] - 3 De GF
Ushers Brewery Ltd. v. King & Co Ltd [1972] Ch 148
Harman Pictures, N.V. v. Osborne & Ors. [1967] 2 All ER 234
Gleeson v. Wippell & Co. Ltd. [1977] 1 WLR 510
Wai Hin Tin Mining Co. Ltd. v. Lee Chow Beng [1968] 2 MLJ 251
Weston v. Arnold [1873] 8 Ch App 1084
Griffith v. Blake [1884] 27 Ch D 474
John B. Skilling & Ors. v. Consolidated Hotels Ltd. [1979] 2 MLJ 2
B. v. Comptroller of Inland Revenue [1974] 2 MLJ 110
Ascherberg, Hopwood & Crew Ltd. v. Casa Musicale Sonzogno Di Pietro Ostali S.N.C. & Ors. [1971] 1 WSLR 1128
The Parchim [1917] AC 157
Datuk Jagindar Singh & Ors. v. Tara Rajaratnam [1986] 1 MLJ 105
National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd. [1983] CLJ (Rep) 282
The Odessa [1916] AC 145

Legislation referred to:

Companies Act 1965 ss. 67, 147(3), (5), (6), 128(2), 153, 143(3), 145(4)
Companies Act 13 of 1987, [Sing] s. 76
Companies Act (Cap 185), [Sing] s. 167
Specific Relief Act 1950, ss. 50, 54(j)

Other sources referred to:

Law of Injunctions, Nelson, 2nd Edn. p. 30
24 Halsubry's Laws of England (4th Edn.) para. 958
Injunctions (3rd Edn.) David Bean p. 69
Principles of Modern Company Law Gower, 4th Edn., p 488
Company Receivers & Managers (1981) James O'Donovan p. 48
Gore-Browne on Companies, 42 Edn. p. 717
Principles of Company Law (2nd Edn.) HAJ Ford [Not available in the blue book]
1B Palmer's Company Law 21st Edn., p. 923 [Not available in the blue book]
Halsbury's Statutes of England, 3rd Edn., Vol. 5, p. 163.
Chitty on Contracts, 25 Edn., Vol.1, para. 1034
Foreign Investment Committee Guide lines
Fifth Malaysia Plan 1986-1990
Buckley on the Companies Act, 14th Edn., Vol. 1, p. 157.
Sarkar's Law Of Evidence, 13th Edn., p. 231
Injunctions, 3rd Edn., by David Bean, p. 69
Spry on Equitable Remedies, 3rd Edn., p. 618

For the plaintiff - The late V.K. Palasuntharam; M/s. V.K. Palasuntharam
For the defendants 1 to 7, 11 & 12 - H.Y Too; M/s. Shook Lin & Bok

JUDGMENT

Mahadev Shankar J:

The plaintiffs are minority shareholders in United Securities Sdn. Bhd. (United Securities) which borrowed the equivalent of RM43,850,000 (the said loan) from the first defendant Overseas Union Bank Limited (the bank).

By way of collateral, United Securities executed a loan agreement and a debenture. The plaintiffs as directors and the 10th defendant Dato' Abdullah Mohamed as chairman of United

Securities executed a personal guarantee for the said loan.

United Securities defaulted in making payment. So the bank activated measures to enforce the loan documents.

The plaintiffs filed this suit and obtained an *ex parte* injunction principally upon the ground that the transaction was illegal as being in contravention of s. 67 of the Companies Act 1965 and the Guidelines of the Foreign Investment Committee. The bank applied to have the injunction set aside. I did so. My reasons follow.

The case centres around sixteen lots of land (the said land) along Raja Chulan within the so-called Golden Triangle of Kuala Lumpur. Near one end was the Weld Supermarket. At the other was the Bukit Nanas Handicraft Centre. In August 1983 M/s. Jones Lang Wooton valued the said land at RM170 million.

At all times material to this action, the said land was registered in the name of the 12th defendant City Centre Berhad - (City Centre). City Centre had an issued share capital of 2,500,000 shares of RM1 each. Before the present exercise Ban Lee Sdn. Bhd. (Ban Lee) was the registered owner of 1,250,000 shares or a 50% interest therein. United Securities Sdn. Bhd. - the 11th defendant - (United Securities) held the other 50%.

In June 1982 United Securities and City Centre underwent some major changes in their share structure.

By an agreement dated 9 June 1982 between Dato' Abdullah Mohamed (the 11th defendant) and Ban Lee, Dato' Abdullah agreed to acquire from Ban Lee its 50% interest in City Centre at RM32 per share for RM40 million. In another agreement dated 15 June 1982 between Dato' Abdullah and United Securities Dato' Abdullah agreed to assign the 50% interest to the United Securities at cost. Since United Securities already had 50% of City Centre, this exercise when completed would have resulted in City Centre becoming a wholly owned subsidiary of United Securities.

Cheah Theam Swee the first plaintiff then held 200,330 shares and his brother Dr. Cheah Theam Kheng 200,329 shares in United Securities.

On 15 June 1982 Dato' Abdullah entered into separate agreements with eight other shareholders of United Securities, most of whom appear to be related to the first and second plaintiffs. These agreements were to enable Dato' Abdullah to acquire 699,850 shares of RM1 each representing 63.6% of the issued share capital of United Securities at RM39 per share for a total consideration of RM27,294,150. The result of this acquisition was to reorder the structure of United Securities so that Dato' Abdullah had 63.6% and the first and second plaintiffs had 18.2% each of the equity of United Securities.

Malaysian International Merchant Bankers Berhad (MIMB) were appointed to put the transaction through, presumably because of their expertise in these matters. MIMB applied to the Foreign Investment Committee for the necessary approval. In doing so MIMB brought all the aforesaid agreements to the attention of the FIC on 18 September 1982. Enc.3 Ex. CTS4 is proof of that. It is headed:

> Proposed acquisitions of:
>
> (i) 50% of City Centre Bhd. by United Securities Sdn. Bhd. and
>
> (ii) 63.6% of United Securities Sdn. Bhd. by Dato' Abdullah Mohamed.

The letter then paraphrases the contents of the agreements aforesaid dated 9 and 15 June between Dato' Abdullah Mohamed and Ban Lee United Securities, and the eight individual

shareholders of United Securities and the resultant reordering of the share structures of United Securities as a company in which Dato' Abdullah would hold 63.6% and the plaintiffs 36.4%, and City Centre becoming a wholly owned subsidiary of United Securities. Then follows these two paragraphs.

> 2. The FIC also noted that City Centre owns approximately 7.2 acres of land, situated along Jalan Raja Chulan, Kuala Lumpur which the company proposes to develop into condominiums, offices, and commercial complexes maintaining at least 51% Bumiputra participation in its equity at all times and City Centre complying with the conditions of all the relevant authorities in regard to the development of its land.

On 2 October 1982 City Centre charged the said land to the bank to secure its "existing borrowings" from its Kuala Lumpur Branch. The first plaintiff has alleged that these "existing borrowings" included the sum of RM4,000,000 for which United Securities borrowed in order to make an advance payment of 10% for the price of RM40,000,000 for the remaining 50% of the shares in City Centre. In addition these "existing borrowings" also included other sums borrowed by City Centre. (See E1 para. 17 and E3 para. 14(c)).

The bank's response to this is that the said lands were charged "for the purposes so described in the said charge" which was duly registered and the title deeds were deposited with the bank, but that the borrowings of City Centre have been paid off and accordingly the bank claims no interest in the aforesaid charge or in the said lands and that since December 1982 City Centre was entitled to have the charge discharged. Neither party has produced any other particulars about this transaction. From the point of view of the plaintiffs the only emphasis placed thereon is that the title deeds to the said land never left the custody of the bank after 2 October 1982.

At some point prior to 11 November 1982 United Securities applied to the bank for a loan of the equivalent of RM43,850,000. In the nature of things there can be no doubt that the first plaintiff had actual and active knowledge of every material step in the transaction from start to finish. Since the second plaintiff and the 10th defendant were also directors of United Securities I hold it as a fact that they too must have had actual or constructive knowledge of the same. The first plaintiff is also a qualified advocate and solicitor.

By a letter dated 11 November 1982 the bank offered United Securities the loan facility applied for. The relevant paragraphs of this letter are as follows (paras. 11, 12 and 13 have been omitted):

> **Copy**
> **Overseas Union Bank Ltd.**
>
> 11 November 1982
>
> United Securities Sdn. Bhd.
> 6th Floor, Wisma Methodist
> Jalan Davidson
> Kuala Lumpur 05-05
>
> **Attn: Mr. Cheah Theam Swee**
>
> Dear Sirs
>
> **Loan Facility**
>
> 1. We are pleased to offer you the following loan facility subject to satisfactory security and other documents as hereinafter mentioned being executed by all the parties concerned and to

the terms and conditions as hereinafter set forth.

2. *Facility*
An aggregate amount equivalent to RM43,850,000 for a term of 3 years.

3. *Drawing*
The loan facility shall be drawn down in one lump sum in U.S. currency or other acceptable Euro-currencies approved by the bank, subject to their availability.

4. *Purpose*
The loan facility shall be utilized to finance the acquisition by you of the remaining 50% issued shares in City Centre Berhad ("CCB") and to discharge your present borrowing and the borrowing of CCB.

6. *Security*

(1) You will execute a loan agreement which will set out the terms and conditions of the loan facility and such other terms as may be required by our solicitors.

(2) You will execute and deliver to the bank a deed of debenture containing fixed and floating charges on all your property and assets including a fixed charge on all the shares (including the shares to be purchased) in CCB as security.

(3) On completion of the purchase of the said 50% shares in CCB, all the shares in CCB will be registered in the name of our nominee company. You will thereafter if and when requested by the bank take all necessary steps, or agree to our nominee company taking all necessary steps, to put CCB into members' voluntary liquidation and in that event on commencement of liquidation the liquidator shall transfer the land known as Lots 212 to 217, 223 to 227, 417 to 420 and 1074 in Section 57, Kuala Lumpur (the "land") to you and you will execute a memorandum of charge (the "charge") on the land to the bank to secure the loan, interest thereon and other moneys payable under the loan agreement.

Pre-Disbursement Conditions
Prior to disbursement of the loan or any part thereof the following conditions shall be satisfied:

(1) Execution of the loan agreement and the deed of debenture abovementioned.

(2) Passing of all necessary resolutions and taking of all other corporate actions on your part (as required by our solicitors) to make the loan agreement, the deed of debenture and the charge valid, binding and enforceable.

(3) Issue to the Bumiputra of more than 50% of the shares in your company as required by Foreign Investment Committee (FIC), Malaysia.

(5) Confirmation from FIC being obtained that the approval given on 18 September 1982 will remain in effect.

(6) Exchange control approval on terms satisfactory to the bank being obtained from Bank Negara Malaysia for the loan and repayment thereof and payment of interest and other sums.

8. *Repayment*
The term loan shall be repayable in 3 consecutive annual instalments commencing 12 months from the date of execution of the loan agreement. The first and second instalments shall each amount to 25% of the loan and the final instalment will be the balance (i.e. 50%) of the loan.

Guarantors
The term loan shall be unconditionally and fully guaranteed, jointly and severally, by Messrs. Cheah Theam Swee, Cheah Theam Kheng and Dato Abdullah Mohamed, such guarantee to be on terms satisfactory to us.

Kindly acknowledge your acceptance of the abovementioned loan facility and the accompanying

terms and conditions by signing and returning the duplicate copy of this letter together with your Board Resolution on or before 30 November 1982. If you have any queries, please do not hesitate to contact the undersigned.

Yours faithfully,

Wee Joo Yeow
Senior Manager
Corporate Banking

To: Overseas Union Bank Limited
60 Robinson Road
Singapore 0106

We refer you to the letter above written and hereby accept the offer contained therein. Enclosed herewith is a certified true copy of our Board Resolution.

United Securities Sdn. Bhd.
Sgd.

Date: 19 November 1982.

In accordance with clause 5 of the Predisbursement Conditions aforesaid MIMB applied for and obtained a letter of approval from the FIC dated 22 November 1982. It reads as follows:

Copy

Tuan,

Proposed charging of land by United Securities Sdn. Bhd. for an overseas loan of US$18,502,109 equivalent to RM43,850,000 from Overseas Union Bank Ltd., Singapore.

I am directed to refer to your application for approval of the Foreign Investment Committee (FIC) in respect of the above matter and to inform you that the Committee had considered the application and noted the following:

(i) United Securities Sdn. Bhd. (United Securities) proposes to raise a loan of US$18,502,109 equivalent to RM43,850,000 from Overseas Union Bank Ltd., Singapore. As security for the loan it will execute a first fixed charge over the land held under Lots 212 to 217, 223 to 227, 417 to 420 and 1074, Section 57, Kuala Lumpur, 2,500,000 ordinary shares representing 100% of the paid-up capital of City Centre Bhd. valued at RM2.5 million and a joint and several guarantees by Messrs. Cheah Theam Swee, Cheah Theam Kheng and Dato' Abdullah Mohamed;

(ii) the loan is sought by United Securities to help finance the acquisition of 50% of the issued shares of City Centre Bhd., which has been approved by the FIC on 18 September 1982.

2. I am to confirm that the FIC approval dated 18 September 1982 will remain in effect and to inform you that the Committee has no objection to the proposed charging of the land held under Lots 212 to 217, 223 to 227, 417 to 420 and 1074, Section 57, Kuala Lumpur to Overseas Unions Bank Ltd., Singapore for a loan of US$18,502,109 equivalent to RM43,850,000 subject to the prior written approval for the FIC being obtained in the event of a foreclosure on the land.

The preparation of the formal legal documents then followed. M/s. Shook Lin and Bok in Singapore (SLBS) were acting for the bank. M/s. Nik Hussain Ibrahim and Abdullah (NHIA) in Kuala Lumpur acted for United Securities and its three directors aforesaid.

By a letter dated 2 December 1982 SLBS sent the draft loan agreement, debenture, and guarantee to NHIA, who replied on 8 December 1982. They found the documents substantially in order. One of the proposed pre-conditions before the loan could be drawn down was a

memorandum of transfer duly stamped, but since adjudication could take several months NHIA proposed that the memorandum or transfer be executed in escrow by Gong Wee Ning and Oh Chong Peng (the 8th and 9th defendants). These two gentlemen were both certified public accountants in Coopers & Lybrand. They were proposed by NHIA as the liquidators to be of City Centre if that eventuality arose.

This proposal evidently found favour with the bank and its solicitors. The documents finalised on this basis include:

(1) A director's resolution of United Securities passed on 7 December 1982. This resolved *inter alia* that the company borrow from the bank the said loan, that it execute the loan documents, i.e. the loan agreement, the debenture, and a first charge in escrow over the said land conditional to take effect upon the transfer of the said land from City Centre to United Securities. The resolutions (3), (4), (5), (6) and (7) are reproduced hereunder in full:

> (1) Upon the execution of the loan agreement, the company shall execute and deliver to the bank an irrevocable authority authorising the bank to debit its account with the bank with the balance of the purchase price payable to and pay the same to Ban Lee Sdn. Bhd. and take delivery of the transfer or transfers of the remaining 50% issued shares in City Centre Berhad acquired by the company. The company shall at the same time execute and deliver to the bank a transfer or transfers in favour of the bank or its nominees of all the shares in City Centre Berhad (including the 50% issued shares to be acquired) together with the certificate or certificates for the 1,250,000 City Centre Berhad shares currently held by the company.
>
> Upon the completion of the acquisition of the aforesaid 50% issued shares in City Centre Berhad from Ban Lee Sdn. Bhd. the company shall, as and when required by the bank in writing, take all the necessary steps as set out in the loan agreement, to put City Centre Berhad into voluntary liquidation and in that event, on commencement of the liquidation, cause and procure the liquidator to distribute the said land to the company by way of distribution in specie. The company shall then take all the necessary steps to complete and perfect the charge on the said land as mentioned in (2)(c) above.
>
> (5) Joint and several guarantee be given by Dato' Abdullah Mohamed, Mr. Cheah Theam Swee and Dr. Cheah Theam Kheng guaranteeing the payment of the loan, interest thereon and all other moneys under or in consequence of the loan agreement.
>
> (6) Authority be and is hereby given to any of the three persons, namely Dato' Abdullah Mohamed, Mr. Cheah Theam Swee and Dr. Cheah Theam Kheng to execute the loan agreement and other relevant documents.
>
> (7) Authority be and is hereby given to the execution of the debenture, the charge in escrow and the share transfer or transfers in respect of the shares in City Centre Berhad and all other relevant documents under common seal in the presence of any two (2) of the following three directors, namely Dato' Abdullah Mohamed, Mr. Cheah Theam Swee and Dr. Chan Theam Kheng or any one of the above-mentioned three directors and the company secretary.

(2) A specimen signature letter dated 9 December 1982 signed by all the three directors aforesaid.

(3) A letter dated 15 December 1982 from United Securities to Gong Wee Ning and Oh Chong Peng to confirm that they would act as liquidators of City Centre and upon the passing of a special resolution in terms of the agreed draft transfer the said land to United Securities.

(4) A mandate from United Securities to the bank dated 16 December 1982 whereby the bank was authorised to pay RM36,000,000 to Ban Lee being the balance for the 1,250,000 shares in City Centre.

On 17 December 1982 the formal loan agreement and debenture were executed by United Securities and the bank. The guarantee was executed by the plaintiff and the 10th defendant but not the bank.

Clause 3(c)(x) of the loan agreement required NHIA as the borrowers solicitors to provide a formal legal opinion on the validity and enforceability of the loan agreement the debenture and the guarantee. On 22 December 1982 NHIA in their capacity as the borrowers solicitors rendered this written opinion to the bank. It is a lengthy document running into four closely typed pages. Briefly it vouched for the legality of the transaction and all the documents arising out of and incidental thereto. Some of the clauses are reproduced hereunder being directly relevant to what is to follow:

> 6. Based upon the foregoing we are of the opinion that under the laws of the Federation of Malaysia presently in force:
>
> (a) the borrower and CCB are both companies incorporated and validly existing under the laws of Malaysia;
>
> (b) the borrower has the necessary power and authority, and all necessary corporate and other actions in Malaysia have been taken to enable the borrower to do the following:
>
> (i) to sign and deliver the loan agreement and the security documents and perform the obligations thereunder respectively; and
>
> (ii) to accept the facility on the terms of the loan agreement, to borrow in United States Dollars up to an amount equivalent to Malaysian Ringgit Forty Three Million Eight Hundred and Fifty Thousand (RM43,850,000) pursuant to the loan agreement, to pay interest, fees and all other payments and to give indemnities as stipulated in the loan agreement and to effect repayment of the loan on the terms and conditions therein described;
>
> (c) the due observance and performance by the borrower of the loan agreement and the security documents will not cause:
>
> (i) any limit of borrowing of the borrower or the powers of its directors to be exceeded, and
>
> (ii) any law, regulation or order to be contravened;
>
> (d) each of the guarantors has full capacity to sign and deliver the guarantee and perform the obligations undertaken by him thereunder, and to guarantee and indemnify the bank in respect of the obligations of the borrower under the loan agreement, and due observance and performance by each of the guarantors of the guarantee will not cause any law or order to be contravened;
>
> (e) all permissions, consents or approvals from the relevant authority or authorities, including exchange control approval from Bank Negara Malaysia, required to be obtained by the borrower to make the borrowings under the loan agreement, to repay the loan and pay interest thereon and all other moneys under the loan agreement and the security documents, and to execute and deliver the loan agreement and the security documents, have been obtained and are in full force and effect;
>
> (f) all permissions, consents or approvals from the relevant authority or authorities, including exchange control approval from the Bank Negara Malaysia, required to be obtained by the guarantors to execute and deliver the guarantee to the bank pursuant to the loan agreement and to make payment of all sums guaranteed pursuant thereto have been obtained and are in full force and effect;

(g) the transfer of the land and premises to the borrower in escrow under clause 7 of the loan agreement and the charge executed by the borrower in escrow pursuant to clause 3 (c) (xvii) of the loan agreement are each in a form acceptable for registration under the National Land Code and will on registration thereof be a valid and binding obligation of the borrower and all permissions, consents or approvals from the relevant authorities required to be obtained by the borrower for the execution thereof has been granted and are in full force and effect, and

(h) the loan agreement and the security documents are valid and binding obligations of the borrower and the guarantee is a valid and binding obligation of the guarantors.

8. So far as we are aware we have no reason to believe that the warranties and representations of the borrower contained in clause 16.1 are not true and correct in all material respects.

9. This opinion is addressed to you and is solely for your benefit and may not be relied upon by any other person for any purpose, nor may it be quoted or referred to in any public document, nor may it or copies of it be shown to or filed with any Government or other agency or any other person without our consent.

On 27 December 1982 United Securities drew down the said loan. That same day the second defendant, OUB Nominees (Malaysia) Sdn. Bhd. were registered as the shareholders of all the shares in City Centre by virtue of transfers made by the respective previous registered shareholders.

The debenture contained a power of attorney whereby United Securities appointed the bank its attorney whereby the bank could appoint a Receiver over the properties of United Securities. The power extended to holding general meetings of City Centre and appointing directors to its Board.

The said loan was repayable in three consecutive annual instalments payable on 17 December 1983, 1984 and 1985. But the interest was not serviced at all and by 17 December 1984 the first two instalments were overdue. The borrowers were in trouble.

On 3 January 1985 the bank's solicitors deposited the debenture containing the aforesaid power of attorney with the Assistant Registrar of this High Court. Acting as attorney of United Securities the bank appointed the 5th, 6th and 7th defendants as directors of City Centre from 31 January 1985 till the next annual general meeting of this company. One Lim Choon Hong was removed as a director of the company by the same resolution.

On 7 February 1985 the board of directors of City Centre met again Dato Abdullah the 10th defendant chaired the meeting. The first plaintiff also attended as did the bank's three directors aforesaid. United Securities defaulted on two instalments with interest unserviced on the said loan was the subject of discussion. The enforcement of the loan documents was mooted if the default continued. Mr. Cheah Theam Swee made some suggestions for refinancing. Finally the meeting resolved:

That unless a viable proposal for the repayment of the bank loan is submitted by Mr. Cheah Theam Swee and/or Dato Abdullah Mohamed by 31 March 1985 and that such proposal is acceptable to the bank, the properties of the company shall be sold and that the proceeds therefrom shall be transferred to the parent company, USSB, for the purpose of fully discharging its debts obligations to the bank.

What has been emphasised here is that the first plaintiff was a party to this resolution which was confirmed on 22 March 1985.

No viable proposal was forthcoming by March 1985. The bank consequently exercised its powers under the debenture and appointed Ramli bin Ibrahim and Paul Geh Receivers of United Securities with effect from 3 May 1985.

On 5 October 1985 the bank forwarded to Mr. Cheah Theam Swee and Dato Abdullah a copy of the conditions for sale by tender of the said land. Clauses 20 and 21 of the conditions are reproduced hereunder:

> 20. The property is sold subject to the compliance by the purchaser at his sole cost and expense with and obedience of all regulations, orders, directions, requisitions and governmental charges affecting the property whether made before or after the date of completion or any Court statutory municipal or competent authority person or body having any jurisdiction or control over the property or any part thereof and the purchaser shall be deemed to have full notice of any such regulations, orders, directions, requisitions or charges.
>
> 24. In addition and without prejudice to the generality of condition 20 above the purchaser shall be solely responsible for obtaining any governmental approvals (including but not limited to that of the Foreign Investment Committee of the Prime Minister's Department of Malaysia) necessary for the completion of the sale and purchase and the registration of the transfer. The purchaser shall at its own cost and expense comply with, observe and adhere to all the conditions that may be imposed in connection with such aforesaid approvals. The failure to obtain any of such aforesaid governmental approvals shall not nullify the sale and shall not be a ground for withholding or delaying payment or completion hereunder.

M/s. Shook Lin & Bok Kuala Lumpur were to co-ordinate the proposed sale. They advertised it in the newspapers. All tenders were to be received by 1 November 1985.

On 26 October 1985 the plaintiffs filed this suit and simultaneously applied for an *ex parte* injunction to stop the sale. There are twenty-two separate prayers on the statement of claim all of which add up to this. The plaintiffs were now contending that the entire loan transaction was illegal, void and invalid and consequently the said loan need not be repaid, the securities therefore should be struck down. In other words this Court was being asked to tell the bank to kiss goodbye to the RM43 million it had lent United Securities.

The application for the *ex parte* injunction was supported by the affidavit of Mr. Cheah Theam Swee alone, deposed to on 30 October 1985. He was privy to all facts for years. But with the support of a certificate of urgency, the *ex parte* injunction to stop the tender exercise was obtained on 1 November 1985.

The papers filed were by voluminous. It is hard to see how the Judge at first instance had any adequate opportunity of ingesting them. The inference is irresistible that it is on the reliance of the good faith of the first plaintiff and his Counsel that the *ex parte* injunction was granted in terms "subject to the usual undertaking as to damages."

I must now summarise the grounds urged in the first plaintiff's affidavit-in-support:

(1) It was alleged that the debenture had not been deposited with the Assistant Registrar of the High Court and consequently the Powers of Attorney Ordinance 1949 had not been complied with.

(2) Consequently it was submitted that the removal of Lim Choon Hong and the appointment of the fifth, sixth and seventh defendants as directors of City Centre on 31 January 1985 was invalid.

(3) It was alleged that the provision of the said loan was a violation of the provisions of s. 67 of the Companies Act 1965 as well as being opposed to public policy and therefore illegal, void and invalid because the effect of the entire transaction was for City Centre to provide financial assistance for the purchase of its own shares since it was City Centre's land which was the real security for the said loan which was used by United Securities to buy City Centre shares from Ban Lee.

(4) It was alleged that the guarantee executed by the first and second plaintiffs and the tenth defendants was invalid because:

(a) the bank had not also executed it and/or

(b) the guarantee in express terms was not merely a guarantee but an indemnity since it made these gentlemen liable as principal obligors, which they had never really agreed to do and/or

(c) the FIC in its letter of approval had only agreed to a "guarantee" and not to a guarantee which contained a principal debtor clause, and consequently there had been a violation of the Government Guidelines for FIC approval - (enc.3 paras. 27-33).

(5) That the FIC had not given its express approval or consent for United Securities to enter into the obligations contained in the debenture whereby the bank was empowered to have all the City Centre shares vested in the name of the second defendant and to appoint additional directors to City Centre or a receiver and manager to United Securities, and consequently this was also a violation of the Government Guidelines aforesaid which nullified the loan documents - (See enc. 3 paras. 33 to 39)

(6) That as the prior permission of the FIC had not been obtained to the tender exercise proposed with a reserve of RM70,000,000 for the said land, this proposed sale was also a violation of the Guidelines and invalid - (See en. 3 para. 46.)

I am not clear why Dato' Abdullah was not a co-plaintiff in this case. The reasons given in para. 53 of the first plaintiff's affidavit as to why he is the 10th defendant have not convinced me why he should be slotted there. The obvious advantage was that he would be exempted from giving security or being liable to costs. Both plaintiffs were minority shareholders albeit a substantial minority, and it was claimed that they were bringing this action on behalf of all the shareholders of United Securities and City Centre.

It was the bank which stood to suffer if this injunction was improperly granted. But in his affidavit there is no undertaking for any damages which the Court may order to be paid to the bank. Such undertakings as were given by the first plaintiff was for "damages" which may be awarded to City Centre, or the receivers of United Securities i.e. the 3rd and 4th defendants. The first plaintiff claimed to make this affidavit on behalf of the second. Nowhere is there any indication what the source of this authority is. The whereabouts of the second plaintiff have not been disclosed. The first plaintiff is resident outside the jurisdiction.

The plaintiffs extracted the sealed copy of their *ex parte* injunction on 2 November 1985. The "usual undertaking as to damages" which the Judge ordered was translated into the order itself as an undertaking to the 3rd, 4th and 12th defendants only.

All the defendants entered appearance. The banks' solicitors went on record for all the defendants except the 8th and 9th defendants - the liquidators and the 10th defendant, Dato Abdullah who were separately represented.

On 30 October 1985, (that is to say before the application for the *ex parte* injunction was heard) the first plaintiff purportedly requested Mr. Lim Koh Heng one of the secretaries of United Securities and City Centre to issue a notice of a board meeting of City Centre for 13 November 1985. Mr. Lim Koh Heng says that he sent by ordinary post notices of the said meeting to the first plaintiff, and the 5th, 7th and 10th defendants. That meeting did not take place because only the first plaintiff was present.

On 15 November 1985 the first plaintiff requested the secretary to issue another notice for a meeting to be held on 19 November 1985 at 3.30 p.m. Again he says he sent the notices by ordinary post, and presumes they were delivered because they had not been returned by the post office.

But the 5th, 6th and 7th defendants have each sworn affidavits that they did not receive any prior notice of the proposed board meeting of City Centre to be held on 19 November 1985.

On that day at 3.30 p.m. a Board Meeting of City Centre was held but not at Wisma Methodist, Lorong Hang Jebat, Kuala Lumpur which is the Registered Office of this company. It was held at the 33rd Floor of Menara Promet. Only Dato' Abdullah the 10th defendant and Mr. Cheah Theam Swee were present along with the secretary.

There is a statement in the minutes that the directors had been informed of the change of venue by telephone but there is no direct evidence of the appointment of the 5th, 6th and 7th defendants as directors of the 12th defendant had become *sub-judice*, the first plaintiff and the 10th defendant resolved that these defendants not be re-elected as directors.

Simultaneously as would appear from the minutes aforesaid (see enc. 24 Ex. CTS15A) Dato' Abdullah Mohamed and Mr. Cheah Theam Swee purported to hold an annual general meeting of City Centre. Now ever since 27 December 1982 all the shares in City Centre had been registered in the name of the second defendant. But the second defendant had received no notice of this annual general meeting. But claiming that "he was the person duly appointed by United Securities pursuant to s. 147(3) of the Companies Act 1965 to act at all meetings of City Centre to whose entire capital United Securities is beneficially entitled" Dato' Abdullah proceeded to assert for the purposes of s. 147(6) of the Act that the resolutions put forward at that meeting had been duly passed. In fact Dato' Abdullah only held one share in United Securities. It is claimed that he is beneficial owner of 699,850 shares therein but these shares are registered in the name of D & C Bank Nominees Sdn. Bhd.

This meeting terminated at 3.40 p.m. At 3.40 p.m. another directors meeting of City Centre was convened by these gentlemen. Notice of meeting is said to be convened with the mutual consent of the directors i.e. Dato' Abdullah and Cheah Theam Swee who then purported to proceed to dismiss Shook Lin & Bok as the solicitors of City Centre and appoint Mr. V.K. Palasuntharam instead with instructions to apply to make City Centre a co-plaintiff in this action. No such application has been made in this Court to date.

The validity of these meetings and resolutions is contested by the relevant defendants who filed the necessary affidavits and applied by motion on 2 February 1986 for the *ex parte* injunction to be discharged on a multitude of grounds which I shall now address myself.

At the outset Mr. H.Y. Too of Counsel for the bank and its associated defendants referred to s. 50 of the Specific Relief Act 1950 which provides that preventive relief by way of inunction is only granted at the discretion of the Court. *Nelson's Law of Injunctions* 2nd Edn. [1983] at p. 30 was referred to. The applicant must show equities which would impel the Court to exercise the discretion in its favour. He must come into Court with clean hands:

See *Seeni Chettiar v. Santhanathan Chettiar* [1986] 20 ILR (Madras) p. 58 at p. 67. He must show that his own acts have been fair and honest, and free of fraud or illegality.

The plaintiffs and Dato' Abdullah and their then solicitors were involved up to the hilt in all stages of the negotiations for the said loan, the finalisation of the loan documents, their execution, and subsequent implementation. Mr. Too then referred to *Lakshminarasimhiah v. Yalakki Gowdiah* [1965] AIR Mysore 310 where a suitor who was himself guilty of misconduct was denied relief. Also to *Lodge v. National Union Investment Company Ltd.* [1907] 1 Ch 300 where equitable relief was refused to a borrower who having taken the loan sought to recover his securities on the ground that the lender was an unlicensed money lender.

It was further submitted that the acquiescence was a bar to relief: Section 54(j) of the Specific Relief Act 1950 was relied upon, and *Sayers v. Collyer* [1884] 28 Ch D 103 and *Dhannu Lal Marwari v. Bansidhar Marwari* [1929] AIR (Pat) 349 was referred to. The conduct of the plaintiffs and their legal advisors, at the material time was such as to disentitle them to relief.

The next line of submission by Mr. Too was that an *ex parte* injunction may be discharged if it had been obtained by the suppression of material facts: See *Boyce v. Gill* [1891] 64 LT 824 and *M.R.K. Nayar v. Ponnusamy & Ors.* [1982] CLJ (Rep) 218.

In his affidavit the first plaintiff had suggested that because the debenture had not been deposited with the High Court the power of attorney under which the 5th, 6th and 7th defendants had been appointed was invalid and the act of these directors in passing a resolution on 7 February 1985 was also invalid. But the debenture had been registered on 3 January 1985. Furthermore the first plaintiff did not disclose that the sale he was now seeking to prevent was one which was being carried out pursuant to the resolution aforesaid to which he and the 10th defendant had themselves approved.

To bolster his allegation that s. 67 of the Companies Act 1965 had been contravened the first plaintiff affirmed in his affidavit (enc. 3 para. 21) that the bank had caused United Securities to transfer the 1,250,000 shares in City Centre to the bank Prior to the said loan. In fact the loan documents were executed on 17 December 1982. Draw-down took place on 27 December 1982. The shares were transferred on that day.

Nor had the plaintiff disclosed that United Securities were grievously in default of their instalment payments which had necessitated the move to sell the said lands.

The next item of non-disclosure was that first plaintiff in his affidavit (enc. 3 para. 46) conveyed the impression that the proposed sale was being undertaken in violation of the FIC guidelines and was therefor illegal because the prior permission of the FIC had not been obtained. What the Court was not told was that clause 20 of the conditions of tender expressly made the entire exercise subject to FIC approval.

Nor was the attention of the Court drawn to the formal written opinion which the plaintiff's solicitors NHIA had rendered on 22 December 1982 that the loan documents contravened no law.

Mr. Too also drew the Court's attention to *American Cyanamid v. Ethicon* [1975] AC 396 which was adopted in *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 MLJ 150. Where damages would be an adequate remedy no interlocutory injunction should be granted. The plaintiff did not own the said land. They were only minority shareholders in United Securities. The monetary value of any damage which they may have suffered if the land was sold was easily capable of quantification. The first defendant was good for any such damages.

The next point taken was on the balance of convenience. Defendants evidence was that the said land which was fixed with a reserve price of RM70 million in November 1985 had already fallen by the time I heard arguments to about RM45 to RM55 million; Interest on United Securities loan was accruing at the rate of US$7,000 daily. With the debt mounting on one side, and the value of the asset falling the financial viability of the plaintiffs to honour their undertaking to pay damages was critical. Where it is evident that the undertaking is barren the injunction should be refused. On the relevance of the financial ability of the respective parties as a proper factor to be taken into consideration Mr. Too cited *Lian Keow Sdn. Bhd. & Anor. v. O.C.F. (M) Bhd.* [1982] CLJ (Rep) 182.

The next submission which Mr. Too made in his opening address was directed to the invalidity of the actions of the first plaintiff and the 10th defendant on 19 November 1985 when they purported to hold Board Meetings and an annual general meeting of City Centre whereby the 5th, 6th and 7th defendants were purportedly unseated from the board of City Centre.

The effect of s. 147(3)(a) of the Companies Act 1965 was that United Securities could by a resolution of its directors, being a shareholder of City Centre, authorise a person to act as its representative at one or all meetings of City Centre, but Mr. Too submits that there was no evidence tendered that Dato' Abdullah was so empowered to act at the meeting on 19 November 1985. The effect of s. 147(6) of the Companies Act is that since United Securities was the holder of all the shares of City Centre, a minute signed by the representative of United Securities appointed under s. 147(3) that any resolution required by the Act or the memorandum and articles of City Centre to be passed at an ordinary or extraordinary general meeting of City Centre has been passed shall be deemed to have been duly passed. Again some proof is required that the representative was duly appointed under s. 147(3). Section 147(5) of the Act provides that a certificate under the seal of United Securities that Dato' Abdullah was so appointed would be *prima facie* evidence. There was here no evidence of any certificate or of any other kind that Dato Abdullah was so authorised.

Since 27 December 1982 all of City Centre's shares had been registered in the name of the bank's nominees. Dato' Abdullah had personal knowledge of this. So had Mr. Cheah Theam Swee. City Centre could not resolve to appoint Dato' Abdullah as United Securities representative under s. 147(3) of the Act on 19 November 1985.

Only United Securities could do so. On 17 December 1982 one of the loan documents executed was the debenture. By clause 8(d) of the debenture United Securities had appointed the bank its attorney *inter alia* to convene general meetings of shareholders of City Centre when and in such manner as it thought fit, and by clause 8(f) to attend as United Securities representative under s. 147(3) of the Companies Act 1975 at all or any general meetings of City Centre and by clause 8(g) to sign as United Securities representative under s. 147(3) of the Companies Act 1975 any minutes of City Centre. By 31 January 1985 the bank had already appointed Robert Wong the 7th defendant to be its signatory whereby he became the authorised representative of United Securities under s. 147(6) of the Companies Act. (See enc. 3 Ex. CTS6). Both Cheah Theam Swee and Dato Abdullah knew of this. If the debenture was valid, and their solicitors had so represented to the bank before the loan was paid over, then both of them knew that they had no power to call for the meeting on 19 November 1985 or for Dato Abdullah to act as he did, because their powers, if any, in this regard by the very terms of the documents, had lapsed when it came into existence!

Again by March 1985 United Securities was in default and by the meeting on 22 March 1985 to which the first plaintiff and tenth defendant were parties, a decision had been taken to enforce the loan documents if acceptable proposals for repayment were not forthcoming. They were not. By clause 11 of the debenture one of the powers of the bank on default was to appoint receivers. And on the 3rd and 4th defendants receivers of United Securities. In law the effect of the appointment of receivers was that the board of directors of United Securities as from the appointment became *functus officio*: See Gower, *Principles of Company Law* 4th Edn., p. 488, and also *Company Receivers and Managers* by James O' Donovan [1981] at p. 48.

Another objection taken to the validity of the purported Board meetings of City Centre on 19 November 1985 by Dato' Abdullah and Cheah Theam Swee was the omission to give due notice or any notice at all of these meetings to the 6th, 7th and 8th defendants. The last minute change of venue from Wisma Methodist to Menara Promet was also not duly notified. Such omissions by themselves would invalidate the meeting: See *Gore Browne on Companies* 42nd Edn., p. 717 and *Re Homer District Consolidated Gold Mine* [1888] 39 Ch 546; *Re Portuguese Consolidated Copper Mines Ltd.* [1889] 52 Ch D 160 and *Young v. Ladies Imperial Club* [1920] 2 KB 523.

Yet another objection to the validity of the meetings was this. The object of the meeting was a concerted move between the plaintiffs and Dato' Abdullah to remove the 5th, 6th and 7th defendants from the board. As the minute of the meeting says in so many words Mr. Cheah at this meeting told Dato' Abdullah that he had filed this writ in which one of the matters taken up was the alleged irregularity in the appointment of the 5th, 6th and 7th defendants as directors and that he did not agree to their re-election. Dato' Abdullah also agreed with Mr. Cheah Theam Swee, and the three "lost' their places on the Board as a result. In effect they were purportedly removed.

Under s. 128(2) of the Companies Act 1965 special notice is required for the removal of a director. Under s. 153 of the Companies Act 1965 'special notice' means twenty-eight days notice. No such notice was given.

Mr. Too further submitted that this method of removal was a contempt of Court because the validity of the appointment of these defendants was one of the very issues raised by the plaintiffs in their writ. By this act the plaintiffs had pre-empted the Court on a matter which was clearly *sub-judice*.

By utilising the device of claiming that Dato' Abdullah was the duly appointed representative of United Securities under s. 147(3) of the Companies Act 1965 the purported Board Meeting of City Centre on 19 November 1985 was able to say that an annual general meeting of the company was held immediately following, even though no actual annual general meeting was held! This notional meeting became possible by the 1st plaintiff and 10th defendant resolving that the 10th defendant as the purported duly appointed representive of United Securities under s. 147(3) sign a minute to that effect under s. 147(6) of the Act.

In addition to the arguments he advanced as to why Dato' Abdullah was in reality only a pretender to legal authority on 19 November 1985 there were other objections to the validity of this notional annual general meeting. The second defendant being the only registered member of City Centre was entitled to attend and vote at that meeting. Section 143(3) and s. 145(4) of the Companies Act required notice of the annual general meeting to be given and served on the second defendant. *Pender v. Lushington* [1877] 6 Ch D 70, *Musselwhite v. C.H. Musselwhite & Son Ltd.* [1962] Ch 964 and *Canopee Investment Pte Ltd. & Ors. v.*

Landmarks Holdings Bhd. & Ors. (Kuala Lumpur High Court Civil Suit D2-22-79 of 1987 Unreported) are all authorities for the proposition that a registered member of a company has a statutory right to receive notice of an annual general meeting. Omission to give notice is fatal.

Furthermore under Article 62 of the memorandum and article of association of City Centre a quorum of two members was required. Neither Cheah Theam Swee nor Dato' Abdullah were members of City Centre on 19 November 1985.

We were concerned here with a non-resident plaintiff. Mr. Too finally submitted on the authority of *Marc Rich & Co. Pte. Ltd. v. Oroleum International Ltd.* [1987] 1 MLJ cl xxviii that unless the plaintiffs gave security for damages the writ should be struck off.

In his efforts to support the *ex parte* injunction he had obtained Mr. Palasuntharam concentrated his fire, if I may so put it, on the illegality of the entire transaction. In response to a pointed question which I put to him at the early stages of his submission, he candidly replied that the plaintiffs did not realise that what had been done was illegal until he had told them so, and he then told them what could be done about it.

It follows from this that the plaintiffs instructed him to make good his words and this litigation was initiated.

As against Mr. Palasuntharam's view the solicitors engaged by the plaintiffs, M/s. Nik Hussain Ibrahim & Abdullah warranted on behalf of United Securities and a Queen's Counsel (whoever he may be) advised the bank that the entire scheme was legal. The Foreign Investment Committee and Bank Negara found nothing objectionable in it and gave their blessing. MIMB is a well-known local merchant banking institution, and the third, fourth, eight and ninth defendants are well-known chartered accountants in Malaysia.

As to the weight to be accorded to the views of the persons involved on the legality of the transaction Mr. Palasuntharam drew the Court's attention to *Gleeson v. J. Wippell & Co. Ltd.* [1977] 1 WLR 510 where Megarry V.C. said at p. 519 that affidavits should not include a passage from an opinion of a Queen's Counsel or exhibit an article by a learned author as evidence of the legal rights or prospects of a litigant. The reason is obvious. What the law of Malaysia is or what the rights of parties are under that law when the interpretation of that law, or the rights thereunder are disputed is a matter which has to be resolved by the Courts.

Consequently I would state at this juncture that the intrinsic legality of the scheme now that it has been challenged, must eventually be decided here. If it was illegal, as now contended for the plaintiffs then on the authority of *Lonhro Ltd. v. Shell Petroleum Co. Ltd.* [1982] AC 173 Mr. Palasuntharam concedes that the plaintiffs could be classed as co-conspirators. Bearing in mind that in a criminal conspiracy what is critical is not whether the individuals concerned thought, however honestly, that what they were doing was legal, but whether they were cognisant of and participated in the acts which added up to the transgression, the role of the players must wait till the time for final disposal arrives.

The belief of the plaintiffs as to the legality of their acts is relevant to explain their conduct at all material times. As to this Mr. Palasuntharam sought to exclude the opinion of NHIA on 22 December 1982 on the ground that the opinion had been given "without prejudice" and could not therefore be admitted in evidence: This omission I reject: Section 23 of the Evidence Ordinance was meant to cover only genuine overtures for the settlement of an existing dispute. In any case the opinion was given for the bank's benefit and intended to be relied upon as a representation that all was in order. Since the bank relied upon this

representation and released the said loan the issue of whether there is an estoppel here is a serious question to be tried. The legal liability for the opinion, (if matters turn out otherwise) is also still an open one.

Another point I would like to get out of the way is clause 25 of the loan agreement by which the parties agreed that Singapore law should apply. Mr. Too submitted that s. 76 of the Companies Act No. 13 of 1987 makes a transaction where a company finances dealings in its own shares voidable rather than void. If Singapore law applies then it would have a bearing on the issue of illegality. But we are dealing here with two Malaysian Companies and the assets with which we are concerned are wholly within the jurisdiction (even if the loan was a foreign one). Accordingly I did not feel the need to be influenced in any way by the laws of Singapore in making my decision.

Halfway through his submission Mr. Palasuntharam sought to file yet another affidavit on facts which as he himself admitted due diligence would have discovered. Mr. Too strenuously objected. He had already completed his submission and to allow this would be to permit the whole case to be reopened again. I disallowed the application quite simply because to do so would have been to permit an abuse of process. In the absence of specific rules on the matter I am of the view that in the interests of the effective administration of justice the rules as to the finding and service of pleadings should apply *mutatis mutandis* to affidavits. At the very least the parties should thus have adequate notice of each others cases before the hearing and avoid a trial by ambush.

This case was not just exhaustively argued. It was argued to the point of exhaustion. So much so that I feel obliged to emphasise that this was not a final hearing. It was only an interlocutory application.

The principles upon which an interlocutory injunction will be granted have already been expounded in *American Cyanamide & Co v. Ethicon Ltd.* [1975] AC 396. One short passage from that judgment bears repetition as to the correct approach in this case: At p. 408C Lord Diplock said:

> ... If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the Court should then consider whether, on the contrary hypothesis that were the defendant to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.
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> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Earlier in this judgment I have summarised the submissions made by Mr. Too as to why this injunction should go. (See paras. 46 to 69). On the material before me I hold that they have been sustained to the hilt. The non-disclosure of material facts were serious. The manner in

which the plaintiffs and the 10th defendant moved on 19 November 1985 were not only *prima facie* a contravention of the law but clearly constituted *mala fides*. *Ex parte* injunctions are not granted to enable plaintiffs to erode the *status quo* to the detriment of the defendants. There was every indication that damages were an adequate remedy and that the bank was in a position to pay them. On the contrary hypothesis there were very strong indications (which have since been proved by the failure of the plaintiffs to file any affidavit as to means) that the plaintiffs' undertaking as to damages was very nearly worthless.

Regardless of the ultimate merits, *ex parte* injunctions can be set aside and any fresh injunction refused if there was in the first instance a culpable intent to mislead the Court. My decision in *Esa bin Sayon v. Woon Kum Poh* [1985] CLJ (Rep) 463 was not intended to be understood otherwise. I hold as a fact that in this case the non-disclosures and misrepresentation of which Mr. Too complains were deliberate or reckless and such as to disentitle the plaintiffs to equitable relief.

But there is more to the plaintiffs case. Even though Mr. Palasuntharam had no satisfactory explanation or answer to the points mentioned in the last two paragraphs, he was in effect saying that the illegality which he was alleging transcended everything that defendants submitted, and the injunction had to be maintained.

Echoing Diplock LJ, how strong had the plaintiffs case to be on the issue of illegality for all the other factors militating against the injunction to be brushed aside? I would answer thus.

It is not enough in such a case for the issue of illegality to be merely arguable. The evidence of illegality must be clear enough for the Court to be persuaded that it must intervene in order to prevent the law from being further violated. In other words on the uncontested evidence before the Court there must be at the very least a high degree of probability that a permanent injunction will be made at the trial. Such considerations could outweigh the plaintiff's participation in the illegality alleged or his inability to give security or the defendant's capacity to pay damages however large. Where the illegality alleged constitutes the commission of a serious criminal offence the fact that a criminal prosecution is actually pending may also be relevant. There may be other circumstances. Since the human tendency is towards the path of least resistance I have advisedly avoided the escape route of maintaining the injunction willy-nilly and ordering an "early trial" because one of the realities of litigation today is that an "early trial" is anything but early.

Mr. Palasuntharam initially referred to ss. 24 and 25 of the Contracts Act 1950 under which a contract which is tainted with illegality is void and unenforceable. The core of his contention was that s. 67 of the Companies Act had been contravened because the real security for the loan granted was the said land owned by City Centre had not actually entered into any direct contract with bank and the utilisation of the said land to pay off the loan through United Securities as the holding company would only arise in the event that United Securities was unable to pay Mr. Palasuntharam's.

He stressed that one of the obligations that United Securities undertook was to procure that City Centre deposited the title deeds to the said land with the bank. Also that United Securities would ensure till the loan was repaid that City Centre would not do anything to adversely effect its financial worth by altering its share structure or encumbering its assets. As and when required the bank could get at the said land by requiring United Securities to cause City Centre to be voluntary wound-up and the said land to be transferred to United Securities in specie.

The following authorities were cited to show that the scheme was in contravention of s. 67 of the Companies Act 1965 viz. *Armour Hick Northern Ltd. & Ors.* [1980] 1 WLR 1520, *Juniper Pty. Ltd. v. Grausom* [1983] 8 ACLR 212, *Wallesteiner v. Moir* [1974] 1 WLR 991, and *Belmont Finance Corporation v. Williams Furniture* [1979] Ch 250 and (No. 2) [1980] 1 All ER 393.

Section 67(1)(3) and (5) of the Companies Act 1965 as it stood at the time of these transactions read as follows.

> 67.(1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.
>
> 67.(3) If there is any contravention of this section, the company is, notwithstanding s. 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.
>
> 67.(5) The power of a Court under s. 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under sub-section (4) of this section from the liability to have such an order made against him.

By the Companies Amendment Act A.616 of 1985 the section was amended to provide *inter alia* the following new sub-section (3) and (5). (The old sub-section (4) now renumbered (6):

> (3) If there is any contravention of this section, the company is, notwithstanding s. 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.
>
> Penalty: Imprisonment for two years or ten thousand ringgit or both.
>
> (5) The power of a Court under s. 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under sub-section (4) of this action from the liability to have such an order made against him.

Section 354 of the Act reads as follows:

> 354(1) If in any proceeding for negligence default breach of duty or breach of trust against a person to whom this section applies it appears to the Court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the Court may relieve him either wholly or partly from his liability on such terms as the Court thinks fit.
>
> (2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust he may apply to the Court for relief, and the Court shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against him for negligence, deligence, default, breach of duty or breach of trust had been brought.
>
> (3) The persons to whom this section applies are -
>
> (a) officers of a corporation;
>
> (b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;

(c) experts within the meaning of this Act; and

(d) any persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed.

Before I go into what was done in November and December 1982 I think it not irrelevant to make a comment here about the agreements made by Dato Abdullah in June 1982. It is not quite clear to me what real consideration moved from him for the acquisition of 63.6% of the equity of United Securities.

Since under the agreement dated 9 June 1982 he was to acquire 50% of City Centre for RM40 million it follows that the market value of City Centre shares on that date was RM80 million. By the agreement dated 15 June 1982 he was to assign this to United Securities at cost. But what was the *quid pro quo*.

On 15 June 1980 Dato' Abdullah was to acquire 63.6% of the shares in United Securities for RM27,294,150. The result was that since United Securities already owned the other 50% of City Centre, Dato' Abdullah would own 63.6% of an asset worth RM80 million at values then current i.e. a return of RM50,400,000 for an investment of RM27,294,150. Is there a hint there that we are concerned with back to back arrangements? *Belmont Finance Corp. v. Williams Furniture* (No. 2) [1980] 1 All ER 393 was also a case where QC's opinion was taken but the Court found the transaction illegal because "assistance" was deemed provided because the purchasers shares in an outside company had been purchased a gross over-value. Goff LJ described the scheme as an "integrated arrangement."

Both parties have been rather coy about condescending upon further and better particulars about what was done with the money borrowed by City Centre on the charge created in favour of the bank on 2 October 1982. The said loan was used to clear the "existing borrowing" of both United Securities and City Centre. What were these existing borrowings? The bank says the charge was for the purposes "described therein" whatever they may have been. The first plaintiff says that RM4 million was for the down payment of 10% for the 50% equity of City Centre. But borrowed by whom? There is simply not enough material on this aspect of the matter for me to make any positive findings thereon at this stage.

So what I am left with is a statement that by the end of December 1982 the charge by City Centre had been cleared and so far as this company was concerned the bank made no claim to the title deeds to the said land. It was fortuitous that City Centre had not requested their return, say the bank. If it had, the title deeds would have been returned, says Mr. Too.

The only contractual obligation specified in regard to them was in clause 18.3 of the loan agreement which imposed upon United Securities an obligation to cause and procure City Centre to deliver the title deeds to the bank. There is no corresponding contractual obligation on City Centre to make the title deeds available. So the fact that they were left with the bank after the charge of City Centre was paid off was only an administrative convenience according to the bank.

Which brings me to the crux of Mr. Palasuntharam's case. He says as facts clearly fall within the four walls of s. 67(1) of the Companies Act 1965 and the cases he cited, particularly Belmont (No. 2) the illegality was obvious. Were they?

It must once again be emphasised that to fall foul of s. 67 of the Act, it is **City Centre** which must give assistance i.e. the company, **not its shareholders**! There is a passage in *Buckley on the Companies Act* 14th Edn. Vol. 1 [1981] at p. 157 upon which Mr. Too heavily relied. It reads:

> ... In spite of their obvious width, however the words 'financial assistance' do not, it is submitted, comprehend every species of payment or the like made by the company. Thus, the payment of dividends; the return of capital duly confirmed in accordance with s. 66; or the redemption of redeemable preference shares can none of them be properly described as 'financial assistance' within this section, although in each case the result is that the company makes money available to the shareholder concerned. In each case it is the proprietorial right of the shareholder which furnishes the title for the making of the payment and to give effect to such right is not 'assistance'.
>
> If this view is correct, the fact that the company knew that the money would be used by the shareholder for buying or subscribing for its shares or even that the decision to pay the dividend or return the capital or redeem the shares was taken solely in order to enable this to be done is irrelevant.

What produced the said loan was the loan agreement, debenture and guarantee by United Securities, and its directors. By the debenture United Securities pledged all the shares in City Centre which it bought from Ban Lee but this was something it claims it was quite entitled to do. City Centre itself as a company did not pass any resolution. The said land remained in its ownership. It would have continued to do so unless and until it was wound up.

In *Skelton v. S. Auckland Blue Metal Limited* [1969] NZLR 955 the company mortgaged its land *ex post facto* to help the purchase pay for its shares. It was held to have given assistance. Here City Centre had not mortgaged its land for this loan. In *Re Wellington Publishing Company Limited* [1973] 1 NZLR 133 it was held inoffensive for the company to declare dividends even if it was done with knowledge that once received the money would be used to purchase its shares. Since City Centre owned the land and not its shareholders, there was nothing in law to prevent the shareholders in utilising the property which fell to them on a winding-up as they thought fit. That was the argument.

For the reason which I now put forward the English cases cited by Mr. Palasuntharam are not on all fours with the present problem. I do not propose a detailed analysis here. The following observations should suffice:

(a) *Armour Hick Northern Ltd v. Whitehouse & Ors.*

Here there was a direct payment of money by Armour Hick Northern Ltd. (a subsidiary) of 93000 pounds to Armour Trust Ltd so that 7000 shares the latter owned in the holding company Armour Hicks & Partners Ltd. could be transferred to two of the holding company's directors. There is no parallel here. City Centre did not receive anything. It did not transfer anything.

(b) *Juniper Pty. Ltd. v. Grauson* [1983] 8 ACLR 212.

Here the company itself gave a loan to the purchaser of its shares after the contract was made because he could not pay for them.

City Centre did not lend any money to United Securities.

(c) *Wallesteiner v. Moir* [1974] 1 WLR 991.

The company here gave a loan to another company which the purchaser controlled so that he could use the money to buy its shares. City Centre did not give any loan. If any act was eventually required to make the land available it would have been the act not of City Centre, but its shareholders in putting the company into voluntary liquidation.

(d) *Belmont Finance Corporation v. Williams Furniture Ltd & Ors.* (No. 2) [1980] 1 All ER 393.

This was the case upon which Mr. Palasuntharam relied most heavily.

But once again the facts there were that the company whose shares were being acquired had gone and purchased shares in another company not in the ordinary course of its business or for purposes necessary to its undertaking but purely to provide funds which could then be used by the controllers of that company to purchase its own shares.

I do not think it is necessary here to do well on the fact that the scheme proposed would not have prejudiced any shareholder of City Centre, since it was a wholly owned subsidiary, or any creditor, since a voluntary winding-up was envisaged.

On s. 67 therefore it is my view that at best the plaintiffs had a serious question to argue at the trial. I am far from convinced that the result will be a foregone conclusion in their favour, or that the illegality is so clear that all other considerations which militate against maintaining the injunction should be cast aside.

To show that the plaintiffs were not precluded from submitting that the entire transaction was illegal notwithstanding the warranties made in the loan documents by the borrower and the guarantors, Mr. Palasuntharam's contention was that they were the class of people whom s. 67 was intended to protect. There could be no estoppel as regards the contravention of a statute. *Kok Hoong v. Leong Cheong Kwong Mines Ltd.* [1964] MLJ 49, *Rasiah Munusamy v. Lim Tan & Sons Sdn. Bhd.* [1985] CLJ (Rep) 266, *Dottie Karan v. Lachmi Prasad Sinha* [1930] 58 IA 58 were cited. Acquiescence he said was not a bar if the transaction was itself unenforceable in law: *La Banque Jacques Cartier* [1887] 13 AC p. 111. *Patience Kasumu* [1956] AC 539 was referred to show that if a money lending transaction was illegal it would be set aside and the securities returned to the borrower.

These cases demonstrate that if the illegality is clear the Court will lend its aid in striking the transaction down. *Patience Kasumu* [1956] AC 539 is especially demonstrative of the Draconian results which follow if moneylenders do not comply with mandatory legal formalities. The contract is void and unenforceable in law. (See also *Subchent Kaur v. Chai San Kian* [1958] (MLJ 32). But is this that kind of case? Notwithstanding the penal transactions there was no total illegality here. At the time of the conclusion of the transactions in 1982 s. 67(4) did not preclude the company from obtaining relief. By 1985 any doubts as to whether s. 354 of the Act applied to relieve the directors had also been removed. So even if it could be urged that this was an illegal transaction, the repercussions of that alleged illegality was also an arguable matter.

As to the alleged contravention of the FIC guidelines Mr. Palasuntharam relied on *David Hey v. New Kok Ann Realty Sdn. Bhd.* [1985] 1 MLJ 167 where the Supreme Court held that it reflected a national economic policy of which the Court should take judicial notice. In that case there was a total failure to apply for FIC approval which the defendants insisted upon as a pre-condition to rectifying their register, and the Court declined to interfere. He claimed that *M.A.A. Holdings Sdn. Bhd. v. Ng Siew Wah* [1986] 1 MLJ 170 was decided *per incuriam* at first instance. Since the FIC guidelines were public policy non-compliance would invalidate the transaction. *Chitty on Contracts* 25th Edn., Vol. 1, para. 1034, *Wilkinson v. Osborne* [1915] 21 CLR 89 and *Egerton v. Earl Brownlow & Ors.* [1843-60] All ER Rep. 970 were cited in this context. The contention was that the transfer of all the shares in City Centre to the second defendant had contravened Article 6 of the Guidelines because the effect of the transfer was to pass the ownership and control of City Centre to a foreign interest.

But precisely how had the defendants contravened the FIC guidelines or the new economic policy? The glaring distinction between the cases cited by plaintiffs Counsel and this case is that the parties did apply to the FIC and Bank Negara and did obtain their approval to what they proposed to do. The relevant Malaysian Government agencies were fully cognisant that a foreign money loan was being applied for, for which the Malaysian borrower was going to pledge assets which it currently owned (i.e. by the debenture) or which it could come into ownership at some future date if a winding-up of City Centre took place.

The argument arises only because plaintiffs Counsel appears to be submitting that the FIC Guidelines, the Fifth Malaysia Plan, and the letters of approval granted by the authorities should all be rigidly and strictly construed in the manner of a penal statute, in favour of borrowers so that the slightest deviation should result in their being exculpated from their contractual obligations. Thus even though the approval letters expressly take note of the charges of both the assets of United Securities and the shares of City Centre it is being protested that this is unlawful because the second defendant became the registered shareholder of all the City Centre shares. Again because the approval letters said joint and several guarantee, it is being protested that the documents executed were in fact indemnities which made the guarantors, principal obligors. With respect to plaintiffs Counsel if the authorities wished to vet the loan documents before they were executed they would surely have said so.

The FIC Guidelines, Fifth Malaysia Plan, and the approval letters were meant to be construed in the manner of penal statutes. I am unable to see that there has been any contravention of the Guidelines or the new economic policy and it is unnecessary for me to decide at this stage what the consequences may have been if in fact there was a contravention. That matter can also be left for the trial.

As to the damages Mr. Too urged and I agree that if the *ex parte* injunction was improperly obtained an enquiry as to damages could be immediately ordered without waiting for the trial. He cited *Injunctions* 3rd Edn. by David Bean, p. 69, *Ushers Brewery Ltd. v. P.S. King & Co. Ltd.* [1972] Ch 148 and *Ross v. Buxston* [1888] WN 55 *Harman Pictures v. Osborne* [1967] 2 All ER 324 was also cited as an example of a non-resident plaintiff being required to fortify his undertaking as to damages.

On 8 July 1987 I ordered that the *ex parte* injunction be dissolved. Because I was of the view that it was improperly obtained I also ordered that there be an enquiry as to damages. My intention was that these damages be assessed soonest possible without waiting for the trial.

In the light of the material before me I was satisfied that the undertaking as to damages given by the first plaintiff was a barren one because although challenged, he had not responded with any evidence of means. The defendants' evidence was that the delay resulting from the *ex parte* injunction had coincided with a drastic fall in values in the property market which they put at about RM20 million. There is no evidence before me that the market had bottomed out. In this state of affairs it seemed to me that it would have been an exercise in futility for the Assistant Registrar to embark upon an enquiry as to damages if the plaintiffs were in no position to satisfy them.

If they were, then the issue would have arisen as to whether they should pay these damages before the conclusion of the trial or whether they should merely give security for their payment in any event. Once again, unless there was some evidence of means the enquiry would have been an exercise in futility.

A bare undertaking as to damages may be 'usual' as to form, but useless as to content unless the plaintiffs are worth powder and shot. I therefore hold it to be the right of the defendants to be told what the undertaking is worth in real terms.

So far as costs were concerned it was my view that there was no real case of 'urgency' here at all. There could have been no sale of the said land until FIC approval had been obtained in any case, and the liquidation of City Centre was a legal exercise which was also a prerequisite which had its checks and balances. This was never a case for an *ex parte* injunction since the plaintiffs were alleging an illegality which they had helped to create. Their hands were not clean.

After my order Mr. Palasuntharam gave notice of appeal and asked for an Erinford injunction i.e. an injunction pending an appeal against my decision: (See *Erinford Properties Ltd. v. Cheshire Country Council* [1974] 2 All ER 448). In view of the grounds on which I set aside the *ex parte* injunction, I did not think this a proper case to substitute it with an injunction *inter partes* pending appeal. A stay of execution would have had the same result and I refused this also.

Finally as to Mr. Too's prayer that this writ should be struck off if security for damages is not given I made no order at this stage. The plaintiffs have already incurred a liability for damages for having improperly obtained an *ex parte* injunction. If they have not got the means to pay that, the issue as to whether they should be permitted to continue must be further argued because poverty has never been a bar to litigation. The question of security for costs from a non-resident plaintiff must of course be differently treated.

I have to end on a sad note. Alas Velauthampillai Kandiah Palasuntharam is no more. He died before this judgment could be delivered. So it must remain as the final monument to the industry which made this man a legend in his lifetime.

Also found at [1989] 1 CLJ 157